STATEMENT

OF

MORTON ROSENBERG
SPECIALIST IN AMERICAN PUBLIC LAW
CONGRESSIONAL RESEARCH SERVICE

BEFORE THE

HOUSE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY

CONCERNING

THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT

PRESENTED ON

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Mr. Chairman and Members of the Subcommittee:

I am Morton Rosenberg, a Specialist in American Public Law in the American Law Division of CRS. I am honored to appear before you to present another progress report on CRS's efforts with respect to the study project initiated by the leadership of the House Judiciary Committee and your Subcommittee. At that time there was concern that in the last decade, a period coincident with the absence of the Administrative Conference of the United States, many new issues of administrative law, process, and procedure had emerged that had not been properly addressed or perhaps even identified. Today my CRS colleagues, Curtis Copeland and T.J. Halstead, and I will brief you on the status of the study project and what might be done in the future. My testimony will focus on the potential significance of the reactivation of ACUS and on one of the seven elements of the project, the Congressional Review Act. Curtis and T.J. will briefly discuss the other six elements of the study. Let me start with some background.

The Administrative Law, Process, and Procedure Project (Project) has been a bi-partisan undertaking of the House Judiciary Committee, overseen and conducted by its Subcommittee on Commercial and Administrative Law. It has had two principal goals: to reauthorize and to substantiate the need to reactivate the Administrative Conference of the United States (ACUS), and, simultaneously, to set in motion a study process that would identify the important issues of administrative law, process, and procedure that have emerged in the eleven year hiatus since its demise that would serve as a basis for either immediate legislative consideration and action by the Committee or as the initial agenda for further studies by a reactivated ACUS.

Initial success was achieved by the Committee with respect to the first effort with the enactment of the Federal Regulatory Improvement Act of 2004, Pub. L. 108-401, on October 4, 2004, reauthorizing ACUS. But, as of this date, funding legislation has not been passed.

Action to accomplish the second goal was initiated by the Committee's adoption of an oversight plan for the 109th Congress which made a study of emergent administrative law an process issues a priority oversight agenda item for the Subcommittee on Commercial and Administrative Law. The oversight plan identified seven general areas for study: (1) public participation in the rulemaking process; (2) congressional review of agency rulemaking; (3) presidential review of agency rulemaking; (4) judicial review of agency rulemaking; (5) the agency adjudicatory process; (6) the utility of regulatory analyses and accountability requirements; and (7) the role of science in the regulatory process. The Subcommittee, in turn, tasked the Congressional Research Service (CRS) with coordinating the research effort.

ACUS

CRS anticipates that many of the results of the studies and symposia undertaken by and for the Subcommittee will be directly relevant to consideration of legislative action. Other results should be available to affected agencies and may inform or influence action to remedy any administrative process shortcomings identified. In the view of many, however, the value in the long term of an operational ACUS for a fairer, more effective, and more efficient administrative process is inestimable, but sure, and is evidenced by the congressional reauthorization by unanimous consent in 2004. As you are aware, CRS does not take a position on any legislative options. It may be useful, however, for this public

record to review the rationale that appears to have been successful in supporting the passage of the ACUS reauthorization measure.

ACUS' past accomplishments in providing non-partisan, non-biased, comprehensive, and practical assessments and guidance with respect to a wide range of agency processes, procedures, and practices are well documented.[1] During the hearings considering ACUS' reauthorization, C. Boyden Gray, a former White House Counsel in the George H.W. Bush Administration, testified before your Subcommittee in support of the reauthorization of ACUS, stating: "Through the years, the Conference was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist." [2] Further evidence of the widespread respect of, and support for, ACUS' continued work at the hearings was presented by Supreme Court Justices Antonin Scalia and Stephen Breyer. Justice Scalia stated that ACUS "was a proved and effective means of opening up the process of government to needed improvement," and Justice Breyer characterized ACUS as "a unique organization, carrying out work that is important and beneficial to the average American, at a low cost."[3] Examples of the accomplishments for which ACUS has been credited range from the simple and practical, such as the publication of time saving resource material, to analyses of complex issues of administrative process and the spurring of legislative reform in those areas.[4]

During the period of its existence Congress gave ACUS facilitative statutory responsibilities for implementing, among others, the Civil Penalty Assessment Demonstration Program; the Equal Access to Justice Act; the Congressional Accountability Act; the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act; provision of administrative law assistance to foreign countries; the Government in the Sunshine Act of 1976; the Railroad Revitalization and Regulatory Reform Act of 1976; the Administrative Dispute Resolution Act; and the Negotiated Rulemaking Act.

In addition, ACUS produced numerous reports and recommendations that may be seen as directly or indirectly related to issues pertinent to current national security, civil liberties, information security, organizational, personnel, and contracting issues that often had government-wide scope and significance.

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[1] See *e.g.*, Gary J. Edles, The Continuing Need for An Administrative Conference, 50 Adm. L. Rev. 101 (1998); Toni M. Fine, A Legislative Analysis of the Demise of ACUS, 30 Ariz. St. L.J. 19 (1998); Jeffrey Lubbers, "If It Didn't Exist, It Would Have to Be Invented."–Reviving the Administrative Conference, 30 Ariz. St. L.J. 147 (1998); Paul R. Verkuil, Speculating About the Next Administrative Conference: Connecting Public Management to the Legal Process, 30 Ariz. St. L.J. 187 (1998).

[2] C. Boyden Gray, Testimony Before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, Hearing on the Reauthorization of the Administrative Conference of the United States, 108th Cong., 2d Sess. (June 24, 2004).

[3] Hearing on the Reauthorization of the Administrative Conference of the United States, 108th Cong., 2d Sess. (May 20, 2004).

[4] Fine, *supra*, note 1 at 46. See also Gary J. Edles, The Continuing Need for an Administrative Conference, 50 Admin. L. Rev. 101, 117 (1998); Jeffrey Lubbers, Reviving the Administrative Conference of the United States, 51 Dec. Fed. Law 26 (2004).

ACUS evolved a structure to develop objective, non-partisan analyses and advice, and a meticulous vetting process, which gave its recommendations credence. Membership included senior (often career) management agency officials, professional agency staff, representatives of diverse perspectives of the private sector who dealt frequently with agencies, leaders of public interest organizations, highly regarded scholars from a variety of disciplines, and respected jurists. Although in the past the Conference's predominant focus was on legal issues in the administrative process, which was reflected in the high number of administrative law practitioners and scholars, membership qualification has never been static and need not be. Hearing witnesses and commentators on the possible revival of ACUS have strongly suggested that the contemporary problems that would face a new ACUS could include management as well as legal issues. Should Congress reactivate the ACUS, it could assure an appropriate mix of experts, possibly including members with both legal backgrounds and those with management, public administration, political science, dispute resolution, and law and economics backgrounds. State interests might also be included in the entity's membership.

All observers, both before and after the demise of ACUS in 1995, have acknowledged that the Conference was a cost-effective operation. In its last year, it received an appropriation of $1.8 million. But the experts we heard from concurred that it was an entity that throughout its existence paid for itself many times over through cost-saving recommended administrative innovations, legislation and publications. At the heart of this cost saving success was the ability of ACUS to attract outside experts in the private sector to provide hundreds of hours of volunteer work without cost and the most prestigious academics for the most modest stipends. The Conference was able to "leverage" its small appropriation to attract considerable in-kind contributions for its projects. In turn, the resulting recommendations from those studies and staff studies often resulted in large monetary savings for agencies, private parties, and practitioners. Some examples include: In 1994, the FDIC estimated that its pilot mediation program, modeled after an ACUS recommendation, had already saved it $9 million. In 1996, the Labor Department, using mediation techniques suggested by the Conference to resolve labor and workplace standard disputes, estimated a reduction in time spent resolving cases of 7 to 11 percent. The President of the American Arbitration Association testified that ACUS's encouragement of administrative dispute resolution had saved "millions of dollars" that would otherwise have been spent for litigation costs. ACUS's reputation for the effectiveness and the quality of its work product resulted in contributions in excess of $320,000 from private foundations, corporations, law firms, and law schools over the four-year period prior to its defunding. Finally, in his testimony before the Subcommittee Justice Scalia commented, when asked about the cost-effectiveness of the Conference, that it was difficult to quantify in monetary terms the benefits of providing fair, effective, and efficient administrative justice processes and procedures.

I would note that ACUS' established credibility and non-partisan reputation opened doors at federal agencies and allowed access for ACUS-sponsored researchers to internal operational information that normally would not have been available. Professor William West testified before this Subcommittee of the reluctance of most agencies to provide him with information vital to his study on public participation at the development stage of a rulemaking proceeding. His requests for information were often met with reluctance and suspicion and his most valuable contacts with knowledgeable officials were on deep background. This was not the usual ACUS experience where agency cooperation was generally the rule. ACUS researchers were often welcomed largely because the results of their studies were perceived to redound to the benefit of the agency.

The foregoing views on the efficacy of a revived ACUS have not gone without some dissent. Over the past two years there have been unattributed assertions that a reconstituted ACUS would be duplicative of functions that are already being performed by the Office of Information and Regulatory Affairs (OIRA) in OMB. My colleague T.J. has dealt with this contention and will address it in his testimony. Briefly, T.J. has found that the conceded independence and objectivity evidenced by ACUS throughout its 28 year existence, it widely recognized expertise and bipartisan nature is in stark contrast with OIRA's predominant mission of advancing the policy goals of the President in the area of regulation. Former OIRA Administrator John Graham publically conceded the differing roles ACUS and OIRA perform.

You have asked whether reactivation of ACUS to make it operational would be opportune at this time.

The terrorist attacks of September 11, 2001, have had and will continue to have a profound effect on governmental processes. One of the initial responses to the 9/11 attacks was the creation in November 2002 of the Department of Homeland Security (DHS), a consolidation of all or parts of 22 existing agencies. Each of the agencies transferred to DHS had its own special organizational rules and rules of practice and procedure. Additionally, many of the agencies transferred have a number of different types of adjudicative responsibilities. These include such diverse entities as the Coast Guard and APHIS which conduct formal-on-the record adjudications and have need for ALJs; and formal rules of practice; the Transportation Security Administration and the Customs Service, which have a large number of adjudications but do not use ALJs; and the transferred Immigration and Naturalization Service units which also perform discrete adjudicatory functions. The statute is silent as to whether, and to what extent, these adjudicatory programs should be combined and careful decisions about staffing and procedures are still required. Similarly, all the agencies transferred have their own statutory and administrative requirements for rulemaking that likely will have to be integrated. The process of integration and implementation of the various parts of the legislation goes on and is likely to need administrative fine tuning for some time to come. Again, a reactivated ACUS could have a clear role to play here.

The recommendations of the 9/11 Commission with respect to reforms and restructuring of the intelligence community were recognized by the Commission as having the potential of profoundly affecting government openness and accountability. It noted:

> Many of our recommendations call for the government to increase its presence in our lives– for example, by creating standards for the issuance of forms of identification, by better securing our borders, by sharing information gathered by many different agencies. We also recommend the consolidation of authority over the now far-flung entities constituting the intelligence community. The Patriot Act vests substantial powers in our federal government. We have seen the government use the immigration laws as a tool in its counter-terrorism effort. Even without changes we recommend, the American public has vested enormous authority in the U.S. government.
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> At our first public hearing on March 31, 2003, we noted the need for balance as our government responds to the real and ongoing threat of terrorist attacks. The terrorists have used our open society against us. In wartime, government calls for greater powers, and then the need for those powers recedes after the war ends. This struggle will

> go on. Therefore, while protecting our homeland, Americans should be mindful of threats to vital personal and civil liberties. This balancing is no easy task, but we must constantly strive to keep it right. This shift of power and authority to the government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life.

A reactivated ACUS could be utilized to examine the process of implementation of the restructuring and reorganization of the bureaucracy for national security purposes. ACUS could serve to identify measures that might slow down the administrative decisional process, thereby rendering the agency less efficient in securing its goals, and also to assist in evaluating the number and degree of necessary limitations on public access to information and public participation in decisionmaking activities that affect the public.

Finally, in addition to the impact of 9/11, the eleven years since ACUS's demise have seen significant changes in governmental policy focus and emphasis in social and economic regulatory matters, as well as innovations in technology and science, that appear to require a fresh look at old process issues. For example, the exploding use of the Internet and other forms of electronic communications presents extraordinary opportunities for increasing government information available to citizens and, in turn, citizen participation in governmental decisionmaking through e-rulemaking. A number of recent studies has suggested that if the procedures used for e-rulemaking are not carefully developed, the public at large could be effectively disenfranchised rather than enhancing public participation. The issue would appear ripe for ACUS-like guidance. Some other public participation issues that may need study include early challenges to special provisions for rules that are promulgated after a November presidential election in which administrations change on January 20 (the so-called "Midnight Rules" problem); and the continued issue of avoidance by the agencies of notice and comment rulemaking by means of "non-rule rules." Control of agency rulemaking by Congress and the President continues to present important process and legal issues. Questions that might be presented for ACUS study could include: Should the Congress establish additional government-wide regulatory analyses and regulatory accountability requirements? Should the Congressional Review Act be revisited to make it more effective? ACUS could serve to identify measures that might be slowing down the administrative decisional process and rendering agencies less efficient in securing national security goals. ACUS could assist in carefully evaluating and designing security mechanisms and procedures, particularly those that affect public access to information and public participation in decisionmaking activities that affect the public. Is there an efficient way to review, assess and modify or rescind "old" rules? Should codification of the process of presidential review of rulemaking that is now guided by executive order be pursued. Finally, recent studies have raised questions as to the efficacy of judicial review of agency rulemaking. Anecdotal information suggests that appellate courts are overturning challenged agency rules at rates in excess of 50%. As will be discussed below, CRS has commissioned a study to determine the accuracy of such claims. Whatever the result of the study, important questions may be raised. These are among a myriad of process, procedure, and practices issues that could be addressed by a revived ACUS.

Hearings

Since 2004, the Subcommittee has held a series of hearings in anticipation of and as part of the Project. Following its May 20, 2004 oversight hearing on the proposed reauthorization of ACUS, at which Justices Scalia and Breyer testified, the Subcommittee conducted a second hearing on ACUS that examined further reasons why there is a need to reactivate ACUS. On November 1, 2005, the Subcommittee held a hearing on the status of the Project. In 2006, the Subcommittee held three hearings. The first, in March, 2006, focused on the Congressional Review Act in light of the Act's tenth anniversary. The second dealt with how the Regulatory Flexibility Act (RFA) has been implemented since its enactment in 1980 and whether proposed legislation, such as H.R. 682, the Regulatory Flexibility Improvement Act, would adequately address certain perceived weaknesses in the RFA. Finally, on July 14, 2006, the Subcommittee held a hearing on the 60th Anniversary of the passage of the Administrative Procedure Act (APA), addressing the question of whether the APA is still effective in the 21st century.

Symposia

In addition to conducting hearings, the Subcommittee to date has sponsored three symposia as part of the project. The first symposium, held on December 5, 2005, "E-Rulemaking in the 21st Century," dealt with Federal E-Government initiatives. This program, chaired by Professor Cary Coglianese, examined the Executive Branch's efforts to implement e-rulemaking across the federal government. A particular focus of this program was the ongoing development of a government-wide Federal Docket Management System (FDMS). Presentations at the symposium were given by government managers involved in the development of the FDMS as well as by academic researchers studying e-rulemaking. Representatives from various agencies, including the Office of Management and Budget (OMB), the U.S. Environmental Protection Agency, and the GAO, discussed the current progress of e-rulemaking. In addition, academics reported on current and prospective research endeavors dealing with certain aspects of e-rulemaking. The program offered a structured dialogue that addressed the challenges and opportunities for implementing e-rulemaking, the outcomes achieved by e-rulemaking to date, and strategies that could be used in the future to improve the rulemaking process through application of information technology.

On May 9, 2006, the Center for the Study of Rulemaking at American University hosted a day-long conference for the Subcommittee entitled "The Role of Science in the Rulemaking." The four panels – "The Office of Management and Budget's Recent Initiatives on Regulatory Science," "Science and Judicial Review of Rulemaking," "Science Advisory Panels and Rulemaking," and "Government Agencies' Science Capabilities" – reflected the current debate over whether "sound science" has been given sufficient weight in the development of regulatory standards. As part of that debate, questions have been raised about the quality of the data that are used in developing proposed and final rules, the use of peer review panels as part of the process to ensure quality, and the role that risk assessment can or should play in deciding what to regulate and at what levels.

On September 11, 2006, the Congressional Research Service, on behalf of the Subcommittee, sponsored a day-long seminar entitled "Presidential, Congressional, and Judicial Control of Agency Rulemaking," consisting of four panels of academics, government officials and private sector public interest groups that addressed "Conflicting Claims of Congressional and Executive Branch Legal Authority Over Rulemaking," "Judicial Review of Rulemaking," "Congressional Review of Rulemaking," and "Presidential Review of Rulemaking: Reagan to Bush II."

Empirical Studies

Three empirical studies were initiated by CRS. The first, conducted by Professor William West of the Bush School of Government and Public Service at Texas A&M University, studied how agencies develop proposed rules, with a particular emphasis on how rulemaking initiatives are placed on regulatory agendas; how the rulemaking process is managed at inter and intra-agency levels; and how public participation and transparency factor in the pre-notice and comment phase of rule formulation. Professor West presented his findings and conclusions at your March 30, 2006 hearing.

A second study commissioned by CRS sought to fill the void created by the absence of an authoritative, systematic empirical analysis of the effects of judicial review of agency rulemaking by federal appellate courts. Professor Jody Freeman of the Harvard Law School agreed to conduct the study which will analyze the pertinent rulings of all federal circuit courts of appeal from 1995 to 2004 to determine the rate at which rules are invalidated in whole or in part, and the reasons for those invalidations. Professor Freeman's study is still on-going.

A third study arose out of a discussion during the panel on the role of science advisory bodies in agencies at the Science and Rulemaking symposium when it became apparent that there was no authoritative compilation of how many science advisory committees currently exist in the agencies, how they were selected, how issues of neutrality and conflicts of interest were handled, how issues are selected for review, and the impact of advisory body recommendations on agency decisionmaking. CRS commissioned such a study to be conducted by Professor Stuart Brettschneider of the Maxwell School of Public Administration of the Syracuse University. The study is expected to be completed by June, 2007.

The Congressional Review Act (CRA)

Congress's stated objective of setting in place an effective mechanism to keep it informed about the rulemaking activities of federal agencies and to allow for expeditious congressional review, and possible nullification of particular rules, may not have been met. Statistically, to date, over 43,000 rules have been reported to Congress, including over 630 major rules, and only one, the Department of Labor's ergonomics standard, was disapproved in March, 2001. Many analysts believe that the negation of the ergonomics rule was a singular event, not likely soon to be repeated. Witnesses at the hearing pointed to structural defects in the mechanism, most prominently the lack of a screening mechanism to identify rules that warranted review and an expedited consideration process in the House that complemented the Senate's procedures, as well as numerous interpretive uncertainties of key statutory provisions, that served to deter use of the mechanism.

One witness, Todd Gaziano of the Heritage Foundation, while agreeing with the structural critique, suggested that the law's presence, and the threat of the filing of a joint resolution of disapproval, has had a degree of influence that should not be ignored. He argeed, however, that the framers of the legislation anticipated that the mechanism would provide an incentive for legislators to insist on institutional accountability as a response to criticisms that Congress had been delegating vast amounts of lawmaking authority to executive agencies without maintaining countervailing checks on the exercise of that authority. There was recognition among the witnesses that the establishment of a joint congressional committee that would screen rules and recommend action to jurisdictional committees in both Houses could provide the coordination and information necessary to

inform the bodies sufficiently and in a timely manner to take appropriate legislative actions. The balanced nature of such a joint committee and its lack of substantial authority appeared to provide a way to allay political concerns regarding "turf" intrusions. The House Parliamentarian, John V. Sullivan agreed that such a joint committee was a viable construct.

A further question raised at the March hearing, and again at the panel discussion on the CRA at the September 11, 2006, symposium, was whether it was necessary to have all rules reported and reviewed. It was suggested that only "major" rules need be reported, which would save legislative time and money. There was no consensus among the panelists as to who and /or how, "major rule" would be defined. There was agreement among the panelists that a non-substantive advisory joint committee would be a politically viable screening mechanism, but not the same unanimity with respect to an expedited House consideration procedure. Former House Parliamentarian Charles Johnson explained that it was likely that the lack of a parallel House expedited procedure in the CRA was purposeful. He explained that the House leadership believes that the House is a majoritarian institution and that expedited procedures undermines majority rule.

One panelist, Professor Jack Beermann, expressed the view that making it easier for Congress to overturn an agency rule may come at a high political cost. He asked "Does Congress want to be in the position where [it is perceived that] everything an agency does is their responsibility since they've taken it on and reviewed it under this mechanism?... Do they want to have that perception?" He concluded that "I think that this may just increase the blaming opportunities for Congress." Professor Beermann also stated the belief, similar to that expressed by Todd Gaziano, that the current CRA has the effect of forcing the executive to negotiate, which is a satisfactory result.

Proponents of the CRA concept argue that it reflects a congressional recognition of the need to enhance its own political accountability and thereby strengthen the perception of legitimacy and competence of the administrative rulemaking process. It is also said to rest on understanding that broad delegations of rulemaking authority to agencies are necessary and appropriate and will continue for the indefinite future. The Supreme Court's most recent rejection in 2001 in the *Whitman* case of an impending revival of the non-delegation doctrine adds impetus for Congress to consider several facets and ambiguities of the current mechanism. Absent effective congressional review, it is argued, current instances of avoidance of notice and comment rulemaking, lack of full reporting of covered rules under the CRA, and increasing presidential control over the rulemaking process will likely continue.

Let me conclude by observing that much of the Administrative Law Project has an important constitutional dimension, raising the crucial question of where ultimate control of agency decisionmaking authority lies in our constitutional scheme of separated but balanced powers. The tensions and conflicts in this scheme were well brought forth in CRS' symposium on presidential, congressional and judicial control of agency rulemaking. There can be little doubt as to Congress' authority to make the determinative decisions with respect to the wisdom of any particular agency rulemaking and to prescribe the manner in which the review shall be conducted. Whether or not to do so is a political decision, a hard one with many practical consequences.